

1 DENNIS K.BURKE
2 United States Attorney
2 District of Arizona

3 JOHN BOYLE
3 Assistant U.S. Attorney
4 Arizona State Bar No. 015640
4 Two Renaissance Square
4 40 North Central Avenue, Suite 1200
5 Phoenix, Arizona 85004-4408
5 Telephone (602) 514-7500
5 john.boyle@usdoj.gov

6

7 UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9 United States of America,

10 Plaintiff,

11 v.

12 Dennis Mahon,
13 Daniel Mahon,

14 Defendants.

CR-09-00712-PHX-DGC

GOVERNMENT'S RESPONSE TO
DEFENDANTS' MOTIONS TO
SUPPRESS FOR MIRANDA

15 The government hereby submits a consolidated response to Defendants' two motions to
16 "Suppress for Violation of Miranda." (Documents 446 and 481.) The government requests the
17 motions be denied. The Defendants had no expectation of privacy in the back of a patrol van,
18 their statements were voluntary, and there was no interrogation of the Defendants. This response
19 is supported by the attached Memorandum of Points and Authorities.

20
21 Respectfully submitted this 2nd day of September, 2010.

22 DENNIS K. BURKE
23 United States Attorney
24 District of Arizona

25 s/ John Boyle
26 JOHN BOYLE
27 Assistant U.S. Attorney
28

1

2

3 **MEMORANDUM OF POINTS AND AUTHORITIES**4 **I. FACTS**

5 On June 25, 2009, agents from the Bureau of Alcohol, Tobacco, Firearms, and
6 Explosives (“ATF”), deputies of the Ogle County Sheriff’s Office, and inspectors of the United
7 States Postal Service served a search warrant on the Defendants’ residence at 5794 North
8 Blackwood Road, Davis Junction, Illinois. At 6:10 A.M., sheriff’s deputies knocked on the door
9 and informed the Defendants there was a search warrant and a warrant for their arrest. The
10 Defendants refused to comply and engaged in a half-hour standoff with the deputies. At
11 approximately 6:45 A.M., the Defendants informed deputies they would comply, and shortly
12 thereafter both were arrested. ATF agents, who had intentionally stayed away from the property
13 to help diffuse the tension, then drove onto the property and took custody of the Defendants at
14 approximately 6:50 A.M.

15 Between 6:50A.M. and 7:10 A.M., the Defendants were separately read their Miranda
16 rights. ATF Special Agent Sabrina Hager advised Daniel Mahon of the search warrant, allowed
17 him to review it, and then advised him of the arrest warrant. Special Agent Hager read Daniel
18 Mahon his rights from a standard-issue form. Daniel Mahon was asked, “Do you understand
19 this?” Daniel said “I understand.” The entire contact was tape recorded. Daniel Mahon was not
20 asked questions and he did not invoke his Miranda rights.

21 Special Agent Hager then advised Dennis Mahon of the search warrant, allowed him
22 to review it, and then advised him of the arrest warrant. At 7:05 A.M., Special Agent Hager
23 read Dennis Mahon his rights from a standard-issue form. The agent asked if the Defendant
24 understood his rights, and Dennis Mahon nodded his head slightly. He then said, “The small talk
25 is over, I can’t say anything more, except for who is praying for the damn humidity to quit.” He
26 was offered a bottle of water. Agent Hager asked him if he wanted to take his diabetic
27 medication (it was in his pocket), but Dennis declined and said he would take it at 10:00A.M.

28

1 At 7:11 A.M., the Defendants were placed in a police minivan together. They were
 2 given bottled water and the doors were closed. No one else was in the van, although agents were
 3 recording the Defendants as they spoke¹. The first statement from the Defendants after the van
 4 doors were closed was Dennis Mahon saying “We’re probably being recorded right now.”
 5 Despite Dennis’ warning, both Defendants engaged in conversation and made incriminating
 6 statements.²

7 The Defendants sat in the minivan and spoke with each other until 8:28 A.M. when they
 8 notified agents that they wanted to use the bathroom. Dennis Mahon was escorted from the van
 9 to use the bathroom. Daniel Mahon did not use the bathroom, and declined an offer to get out
 10 of the van to stretch his legs.

11 At 8:49 A.M., Daniel Mahon was escorted from the van so that ATF Special Agent
 12 Tristan Moreland could speak with him. Special Agent Moreland spoke with Daniel Mahon for
 13 six minutes during a recorded conversation. (See Attachment A, a transcript of this
 14 conversation.) Agent Moreland told Daniel Mahon that he was not interested in interviewing him
 15 right then, but instead he wanted Daniel Mahon to listen to him. The agent told Daniel Mahon
 16 of the indictment, the facts of the case, other witnesses, other suspects, the leader of WAR (Tom
 17 Metzger), the wiretap, and that other warrants were being served on other suspects that day.
 18 Agent Moreland told Daniel Mahon that he was interested in learning about a fugitive (“Timothy
 19 Coombs”) and about other suspects if Daniel Mahon wanted to speak with him later. Agent
 20 Moreland told Daniel Mahon that Daniel would be appointed an attorney and that Daniel should
 21 talk to his lawyer about his options. Daniel Mahon never invoked his rights during this
 22 conversation. Daniel was asked if he wanted water or to use a restroom. Daniel declined and
 23 said he was fine. Daniel was placed back in the van at 8:57 A.M.

24
 25 ¹ There is a clock displayed on the videotape recording. This clock is the reference for
 26 the times indicated within this motion.

27 ² The conversation contained an array of statements. The Defendants professed innocence
 28 and ignorance numerous times. At other times they talked of fuses, black powder, hiding
 evidence, and eliminating evidence. They also made statements concerning other individuals in
 this investigation.

1 The two Defendants were still being recorded after Daniel Mahon was returned to the
 2 van. The Defendants again made inculpatory and exculpatory statements.

3 At 9:24 A.M., Dennis Mahon was escorted from the van. (Daniel Mahon was asked if
 4 he was comfortable in the van, and he said he was.) After a two-minute wait, Agent Moreland
 5 spoke with Dennis alone, and spoke with him regarding the same topics he had addressed to
 6 Daniel Mahon earlier. The context was similar because the conversation was primarily Agent
 7 Moreland informing the Defendant that the agent knew almost everything about the Defendants
 8 and the case. The conversation was seven minutes long. (See Attachment B, transcript of
 9 conversation.) Near the end of the conversation, Agent Moreland said “I know today is
 10 probably not the time that you’re gonna wanna talk to me, okay?” Dennis Mahon replied, “No,
 11 I’m not gonna say anymore unless I have an attorney.” At the end of the conversation, Agent
 12 Moreland asked the Defendant if he needed water, a bathroom, or food. Dennis made no request
 13 and was placed back into the van at 9:33 A.M. The Defendants’ subsequent conversation was
 14 still being recorded.

15 At 10:13 A.M., the Defendants were given more water and allowed to exit the van to
 16 walk around. Shortly thereafter the Defendants were placed back into the van and driven from
 17 the scene to a county jail.

18 **II. LAW AND ARGUMENT.**

19 This response concerns the statements of the Defendants made to each other while in
 20 the back of a the police van in Illinois. The police did not question the Defendants at the scene
 21 or elsewhere.

22 **A. There is no expectation of privacy in the back of a police van.**

23 The Defendants had no expectation of privacy in the back of the police minivan. “The
 24 touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected
 25 reasonable expectation of privacy.’ ” California v. Ciraolo, 476 U.S. 207, 211, 106 S.Ct. 1809
 26 (1986)(quoting Katz v. United States, 389 U.S. 347, 360 (1967)). The constitutional question is
 27 “whether the person invoking its [Fourth Amendment] protection can claim a ‘justifiable,’ a
 28

1 ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government
 2 action.” Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577 (1979). See also, Minnesota v.
 3 Carter, 525 U.S. 83, 88, 119 S.Ct. 469 (1998)(“The Fourth Amendment protects people, not
 4 places. But the extent to which the Fourth Amendment protects people may depend upon where
 5 those people are.”).

6 Each Circuit that has addressed the issue has found no expectation of privacy in the
 7 back of a police vehicle. “For the reasons already expressed by our sister circuits, we hold that
 8 the back of a police car is not a place where individuals can reasonably expect to communicate
 9 in private.” United States v. Dunbar, 553 F.3d 48, 57 (1st Cir. 2009). See also, United States
 10 v. Clark, 22 F.3d 799, 801-802 (8th Cir.1994) (“the general public has no reason to frequent the
 11 back seat of a patrol car, or to believe that it is a sanctuary for private discussions....we conclude
 12 that a person does not have a reasonable or legitimate expectation of privacy in statements made
 13 to a companion while seated in a police car”; United States v. McKinnon, 985 F.2d 525, 527
 14 (11th Cir.1993) (no “reasonable or justifiable expectation of privacy for conversations ... held
 15 while seated in the back seat area of a police car”); United States v. Hernandez-Mendoza, 600
 16 F.3d 971, 977 (8th Cir. 2010)(“appellants had no reasonable expectation of privacy in a marked
 17 patrol car, which is ‘owned and operated by the state for the express purpose of ferreting out
 18 crime.’ [Clark, at 801].”).³

19 The Defendants were arrested, handcuffed, and placed into a police minivan. They were
 20 handcuffed to their seats inside the caged portion of the van. They were not interrogated, and
 21 they chose to speak to each other. The Defendants did not expect that their conversation was
 22 private, which was demonstrated when Dennis told Daniel that “we’re probably being recorded

23
 24 ³ See further, United States v. Turner, 209 F.3d 1198, 1201 (10th Cir. 2010)(finding no
 25 expectation of privacy in the back of a police car and noting that “[p]atrol cars bristle with
 26 electronics, including microphones to a dispatcher, possible video recording with audio pickup,
 27 and other electronic and recording devices”). At 8:27 A.M., Dennis Mahon used the patrol
 28 microphone/public address equipment in the van to tell agents outside the van that he wished to
 use the bathroom.

1 right now."

2 **B. The Defendants' statements were voluntary.**

3 There is no evidence the Defendants were coerced into making incriminating
 4 statements. "Coercive police activity is a necessary predicate to the finding that a confession is
 5 not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."
 6 Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515 (1986). An admission is deemed to be
 7 coerced where the conduct of law enforcement officials was such as to overbear the accused's
 8 will to resist, thus bringing about a confession not freely self-determined. Beckwith v. United
 9 States, 425 U.S. 341, 347-48, 96 S.Ct. 1612(1976). The taping of the Defendants was not
 10 coercion. See Williams v. Nelson, 457 F.2d 376, 377 (9th Cir.1972) (concluding that the police
 11 recording of a defendant's conversation with his co-defendant-without the knowledge of either,
 12 by means of a concealed microphone-while the two were alone in an interrogation room did "not
 13 constitute coercion").

14 The Defendants were not placed in oppressive conditions that remotely suggest
 15 coercion. The Defendants were given water at 7:09A.M., 8:55A.M., 9:33A.M., and 10:13A.M.
 16 The doors of the police van were closed at 7:11A.M. to keep the air-conditioned van cooler.
 17 The Defendants were given opportunities for bathroom breaks at 7:09A.M., 8:55A.M.,
 18 9:33A.M., and 10:13A.M. They were able to notify agents when they needed something, in
 19 particular a bathroom break. Dennis Mahon declined an opportunity to take medication that was
 20 in his pocket. Daniel Mahon declined an opportunity to exit the van to "stretch his legs" at
 21 9:24A.M. They were seated in normal seats of a police minivan. They were informed at
 22 7:11A.M. that their mother would be taken care of, likely by hospice personnel. The evidence
 23 shows that agents were repeatedly inquiring if the Defendants were comfortable or if they had
 24 any requests. The Defendants' statements were voluntary.

25 **C. Miranda.**

26 This Court must determine if the Defendants invoked their Miranda rights. If they did,
 27 then the Court must determine if the government engaged in conduct reasonably likely to elicit
 28 an incriminating response, and if any statements made were the product of the government's

1 conduct.

2 Daniel Mahon never invoked his Miranda rights, therefore, all of his voluntary
 3 statements are admissible. Dennis Mahon invoked his rights at either 7:05 A.M. or 9:42 A.M.
 4 The government did not question either Defendant or engage in conduct that was reasonably
 5 likely to elicit an incriminating response. Dennis Mahon's statements to his brother were also
 6 not the product of government conduct. Dennis Mahon's voluntary statements are admissible.

7 **1. Invocation.**

8 **Daniel Mahon:** Daniel Mahon did not invoke his Miranda rights at any time on June
 9 25, 2009. He was read and asked if he understood his rights. He said "I understand." Daniel
 10 Mahon cannot claim a violation of his Miranda rights because the law requires that he
 11 affirmatively invoke his rights. "Where the prosecution shows that a Miranda warning was
 12 given and that it was understood by the accused, an accused's uncoerced statement establishes
 13 an implied waiver of the right to remain silent." Berghuis v. Thompkins, 130 S.Ct. 2250, 2262
 14 (2010). The agents tape recorded all of their interactions with him that day. The Defendant does
 15 not notice a single instance in Daniel Mahon's motion where Daniel Mahon invoked his rights.
 16 "The prosecution therefore does not need to show that a waiver of Miranda rights was expressed.
 17 An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into
 18 evidence." Thompkins, at 2261. "As a general proposition, the law can presume that an
 19 individual who, with a full understanding of his or her rights, acts in a manner inconsistent with
 20 their exercise has made a deliberate choice to relinquish the protection those rights afford."
 21 Thompkins, at 2262. The government must show an implicit waiver by a preponderance of the
 22 evidence. Thompkins, at 2261.

23 **Dennis Mahon:** Dennis Mahon made two statements related to invocation. The first
 24 was after agents read him his Miranda rights. His response was: "The small talk is over, I can't
 25 say anything more, except for who is praying for the damn humidity to quit." (The "7:05 A.M.
 26 Statement.") Although this statement may pose a difficult question for the Court, the government
 27 asserts this statement does not rise to level of the requirement in Thompkins. The Supreme
 28

1 Court requires that an invocation be unambiguous. "Thompkins did not say that he wanted to
 2 remain silent or that he did not want to talk with the police. Had he made either of these simple,
 3 unambiguous statements, he would have invoked Here he did neither, so he did not invoke
 4 his right to remain silent." Thompkins, at 2260.⁴

5 The second time Dennis Mahon made a statement regarding invocation was to Special
 6 Agent Moreland after 9:42 A.M. Agent Moreland said "I know today is probably not the time
 7 that you're gonna wanna talk to me, okay?" Dennis Mahon replied, "No, I'm not gonna say
 8 anymore unless I have an attorney." (The "9:42 A.M. Statement.") The government agrees that
 9 this was an unequivocal assertion of the Defendant's Miranda rights.

10 **2. The agents did not engage in conduct reasonably likely to elicit a response.**

11 The government read the Defendants their Miranda rights and placed them into a police
 12 minivan at 7:11 A.M.. There was no conduct by the government that was likely to elicit an
 13 incriminating response. These facts are similar to the numerous cases cited *supra* (Hernandez-
 14 Mendoza, McKinnon, Clark). In each of these cases, two defendants were placed into a patrol
 15 car where police had hidden a recording device. Placing individuals in a car together and hoping
 16 they might incriminate themselves is not a violation of Innis. "Officers do not interrogate a
 17 suspect simply by hoping that he will incriminate himself. In Miranda, and again in Innis, the
 18 Court emphasized: 'Confessions remain a proper element in law enforcement. Any statement
 19 given freely and voluntarily without any compelling influences is, of course, admissible in
 20 evidence.'" Arizona v. Mauro, 481 U.S. 520, 529, 107 S.Ct. 1931(1987) quoting Miranda v.
 21 Arizona, 384 U.S. 436, 478 (1966).

22 Daniel Mahon did not invoke his Miranda rights, therefore, it is irrelevant to determine
 23 if agents questioned him or engaged in conduct reasonably likely to elicit an incriminating
 24 response. This analysis is relevant to Dennis Mahon after he was removed from the van and
 25

26 ⁴ The analysis for invocation is no different for the Fifth or Sixth Amendments. (See
 27 Thompkins, at 2260) ("...there is no principled reason to adopt different standards for determining
 28 when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel
 at issue in [Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350(1994)]").

1 || spoke with Agent Moreland at 9:42 A.M.

2 Prior to the 9:42 A.M. statement, Agent Moreland started the recording and stated,
3 “Yeah, this is S/A Moreland,...this next conversation is going to be with Dennis Mahon, who
4 has been Mirandized and not yet invoked and, ...we're gonna be talking to him about ... the
5 situation.” During the course of speaking to Dennis Mahon, Agent Moreland said “I know today
6 is probably not the time that you're gonna wanna talk to me, okay?” Dennis Mahon replied, “No,
7 I'm not gonna say anymore unless I have an attorney.” Over the next minute, Agent Moreland
8 told Dennis Mahon not to make any statements, but then told him that agents were looking for
9 a “Mr. Coombs.” For his part, Dennis Mahon initiated conversation about a person named
10 “April” and spontaneously told the agent that he did not trust the agent when they first met.⁵ The
11 government does not intend to introduce any of the statements made during this conversation
12 with Agent Moreland that follow Dennis Mahon’s explicit invocation.

13 Upon Dennis Mahon's invocation of his right to an attorney, Agent Moreland was clear
14 that Dennis Mahon should not make any statements. Agent Moreland did not thereafter seek
15 to elicit any incriminating responses, nor did Dennis Mahon make any incriminating statement.
16 In discussing "Mr. Coombs" and whether Dennis Mahon had previously suspected that Agent
17 Moreland was in fact an undercover agent, both Agent Moreland and Dennis Mahon engaged
18 in irrelevant conversation. Dennis Mahon having invoked, and irrelevant conversation being
19 pointless, Agent Moreland disengaged from this contact and Dennis Mahon returned to the
20 police minivan. While in minivan, Dennis was not in the presence of Agent Moreland or any
21 law enforcement agent; his brother Daniel was the only other person in the van. Dennis
22 Mahon's conduct at that point – to choose to talk or not talk to his brother – in a vehicle in which
23 he had no expectation of privacy but outside the presence of law enforcement – was his own
24 choice and not a product of law enforcement having honored his invocation to an attorney.

5 The informant and Agent Moreland, who was posing as a white-supremacist friend of
27 the informant, had previously met with Dennis Mahon at the Defendant's home. On the date of
28 his arrest, Dennis Mahon said he was suspicious because the agent and informant could not
explain how they earned an income.

1 Dennis Mahon did in fact make certain statements to his brother at that time; there is no legal
2 bar to the government's use of those statements at trial.

3 **IV. CONCLUSION**

4 The government requests the Defendants' motions be denied.

5

6 Respectfully submitted this 2nd day of September, 2010.

7 DENNIS K. BURKE
8 United States Attorney
District of Arizona

9 *s/ John Boyle*
10 JOHN BOYLE
11 Assistant U.S. Attorney

12 Certificate of Service

13 I hereby certify that on September 2, 2010,
14 I electronically transmitted the attached
document to the Clerk's Office using the
15 CM/ECF system for filing and
transmittal of a Notice of Electronic Filing
to the following CM/ECF registrant:

16 Deborah L. Williams
17 Assistant Federal Public Defender
18 850 W. Adams Street, Suite 201
19 Phoenix, AZ 85007
deborah.williams@fd.org

20 Barbara L. Hull
21 Law Office of Barbara L. Hull
22 637 N. 3rd Ave, Ste. 3
23 Phoenix, AZ 85003
blhull@q.com

24
25 By: *S/ John Boyle*
26
27
28